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Juara Serata Sdn Bhd v Alpharich Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2010 OF 2011
ABDUL WAHAB PATAIL, ZAHARAH IBRAHIM AND MOHAMAD ARIFF JJCA
30 DECEMBER 2014

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Contract — Building contract — Agreement — Claim for payment under interim certificate and for additional works — Counterclaim for damages for defective workmanship and for making good construction defects — Contractor refused to make payment after completion of project due to available defects — Whether interim certificate fatally flawed and invalid — Whether tainted by mala fides

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This appeal concerned a claim under a building contract for payment under an interim certificate and for additional works. The appellant/defendant ('Juara') counterclaimed for damages for defective workmanship and for making good the construction defects, and liquidated and ascertained damages for delay in the completion of the project. Juara appointed the plaintiff/respondent ('Alpharich') as the sole and exclusive contractor to construct and complete building works. Juara had effectively sub-contracted the works to Alpharich. On the other hand, and under the sub-contract arrangement with Alpharich, Juara as employer was to pay Alpharich the consideration sum of RM4,950,000 'upon certification by the client that the works have been duly completed'. Alpharich agreed to carry out the works in conformity with the drawing plans and the schedule of compliance and to complete the works on or before 31 May 2005. Alpharich was in effect a turnkey contractor for Juara. The works were not completed on the agreed completion date, but were certified as completed on 8 July 2005. Juara had also unconditionally accepted the handing over of the completed works, and had operated the site. The works were confirmed as 100% completed, but a 'Building Defect List' was prepared as well, which included sagging roof, roof leakage, sagging ceiling, apron crack and ponding at toilet and bathroom areas. The architect then issued the interim payment certificate for the sum of RM1,202,500. Juara did not pay the certified amount under the interim certificate, arguing that Alpharich had not constructed the camp in accordance with the schedule of compliance, failed to comply with the drawing specifications, failed to provide septic tanks, failed to complete the project on time, and had failed to remedy defective works. Juara maintained that the interim certificate was fatally flawed and invalid since it was issued without complying with the requirements of cl 8 that required a statement of works done to be first sent to the architect. Juara also attacked the

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issue of the interim certificate as tainted by mala fides on the part of the architect who had failed to act professionally and impartially. It argued that the architect had acted to serve merely the interests of Alpharich. The High Court allowed Alpharich's claim on the interim certificate but not its claim for additional works. The High Court also dismissed Juara's counterclaim. Hence, the present appeal.

Held, dismissing the appeal with costs:

(1) The High Court judge was swayed by the reference made to the Architect by Alpharich under cl 16, and the failure by Juara to resort to the mechanism provided under cl 17 in the event of a dispute on the certification, namely to refer the dispute to arbitration. To appreciate the train of analysis of the High Court (see para 19).

(2) The answers given by PW2 were found to be non-committal or evasive, but the fact remained the agreement itself did not contain a definition of 'statement of work done'. and there was no dispute that the architect conducted a site inspection and evaluation before he issued the interim certificate. The architect's delay in issuing the interim certificate until after the expiry of the defects liability period was also odd. There was no issue on the law on the duties and responsibilities of an architect/consultant as certifier and the circumstances when an interim certificate can be challenged for invalidity. The persuasive authority in the Singapore High Court decision in *Tropicon Contractors Pte Ltd v Lojan Properties* [1989] 3 MLJ 216 which laid down the law that an interim certificate issued without fulfilling stated pre-requirements would be invalid, however, was not, of immediate relevance in view of the larger issue which became the foundation of the High Court decision, namely Juara had to be held bound by the terms of the agreement and it had failed to adhere to the dispute resolution mechanism agreed by the parties (see para 24).

(3) The High Court had not plainly erred in law, or on the facts, to warrant appellate intervention. Having concluded thus, the court was not departing from the established law on the status and validity of interim certificates, and the functions and responsibilities of the architect/consultant as certifier. The challenges to the validity of the interim certificate and the exercise of the responsibilities and duties of the architect should however have been properly brought before an arbitral tribunal as stated in the agreement (see para 25).

[Bahasa Malaysia summary

Rayuan ini berkaitan dengan tuntutan di bawah kontrak bangunan untuk bayaran di bawah sijil interim dan untuk kerja-kerja tambahan. Perayu/defendan (Juara) menuntut balas untuk ganti rugi hasil kerja cacat dan

memperbaiki kecacatan pembangunan dan ganti rugi jumlah tertentu dan ditentukan untuk kelewatan penyelesaian projek. Juara melantik plaintif/responden (Alpharich) sebagai satu-satunya kontraktor dan eksklusif untuk membina dan menyiapkan kerja-kerja pembangunan. Juara secara efektif telah memberi subkontrak kerja kepada Alpharich. Sebaliknya, dan di bawah perjanjian subkontrak dengan Alpharich, Juara sebagai majikan hendaklah membayar Alpharich jumlah balasan RM4,950,000 'upon certification by the client that the works have been duly completed'. Alpharich bersetuju untuk menjalankan kerja selaras dengan pelan lukisan dan jadual kepatuhan dan untuk menyiapkan kerja pada atau sebelum 31 Mei 2005. Alpharich adalah kontraktor turnkey berkuat kuasa untuk Juara. Kerja-kerja todal diselesaikan pada tarikh penyelesaian yang dipersetujui, tetapi disahkan selesai pada 8 Julai 2005. Juara juga telah menerima tanpa syarat penyerahan kerja selesai dan telah mengendalikan tapak. Kerja-kerja disahkan 100% selesai, tetapi satu 'Building Defect List' juga turut disediakan, yang termasuk kenduran bumbung, kebocoran bumbung, keretakan siling, keretakan apron, dan takungan air di kawasan tandas dan bilik mandi. Arkitek kemudiannya mengeluarkan sijil bayaran interim berjumlah RM1,202,500. Juara tidak membayar jumlah yang disahkan di bawah sijil interim, mempertikaikan bahawa Alpharich tidak membina kampus menurut jadual kepatuhan, gsagal untuk mematuhi spesifikasi lukisan, gagal untuk memperuntukkan tangki septik, gagal untuk menyelesaikan projek pada waktu yang ditetapkan, dan gagal untuk meremedikan kecacatan kerja. Juara menegaskan bahawa sijil interim adalah cacat dan tidak sah kerana ia dikeluarkan tanpa mematuhi keperluan klausa 8 yang memerlukan penyata kerja yang disiapkan dihantar terlebih dahulu kepada arkitek. Juara juga menimbulkan isu sijil interim dicemari oleh mala fide di pihak arkitek yang gagal untuk bertindak secara profesional dan sama rata. Ia mempertikaikan bahawa arkitek bertindak semata untuk kepentingan Alpharich. Mahkamah Tinggi membenarkan tuntutan Alpharich untuk sijil interim tetapi tidak untuk tuntutannya bagi kerja-kerja tambahan. Mahkamah Tinggi juga menolak tuntutan balas Juara. Maka, rayuan ini:

Diputuskan menolak tuntutan dengan kos:

(1) Mahkamah Tinggi telah dipengaruhi oleh rujukan yang dibuat kepada arkitek kepada Alpharich di bawah klausa 16, dan kegagalan Juara untuk menggunakan mekanisme yang diperuntukan di bawah klausa 17 dalam keadaan berlaku pertikaian kepada pengesahan, iaitu untuk merujuk pertikaian kepada timbang tara. Untuk menilai analisis Mahkamah Tinggi (lihat perenggan 19).

(2) Jawapan yang diberikan oleh PW2 didapati bukan komital atau mengelak, tetapi hakikatnya perjanjian itu sendiri tidak mengandungi definisi 'kenyataan kerja yang dilakukan, dan tidak ada pertikaian bahawa arkitek menjalankan pemeriksaan tapak dan penilaian sebelum

mengeluarkan sijil interim. Kelewatan arkitek dalam mengeluarkan sijil interim sehingga selepas tamat tempoh liabiliti kecacatan itu juga ganjil. Tiada isu dalam undang-undang mengenai tugas dan tanggungjawab seorang arkitek/perunding sebagai pengesah dan hal keadaan apabila sijil interim boleh dicabar untuk ketaksahan. Autoriti yang meyakinkan dalam keputusan Mahkamah Tinggi Singapura pada *Tropicon Kontraktor Pte Ltd v Lojan Hartanah* [1989] 3 MLJ 216 yang menetapkan undang-undang supaya suatu perakuan interim dikeluarkan tanpa memenuhi prasyarat dinyatakan akan dianggap tidak sah, bagaimanapun, tidak, serta-merta relevan memandangkan isu yang lebih besar yang menjadi asas kepada keputusan Mahkamah Tinggi, iaitu Juara terpaksa diputuskan terikat dengan syarat-syarat perjanjian dan ia telah gagal untuk mematuhi mekanisme penyelesaian pertikaian yang dipersetujui oleh pihak-pihak (lihat perenggan 24).

(3) Mahkamah Tinggi tidak terkhilaf dalam undang-undang, atau kepada fakta, untuk mewajarkan campur tangan rayuan. Setelah menyimpulkan demikian, mahkamah tidak menyimpang daripada undang-undang yang digubal tentang status dan kesahihan sijil interim, dan fungsi-fungsi dan tanggungjawab arkitek/perunding sebagai pengesah. Cabaran untuk kesahihan sijil interim dan pelaksanaan tanggungjawab dan tugas-tugas arkitek walau bagaimanapun perlu dibawa dengan sepatutnya di hadapan tribunal timbang tara seperti yang dinyatakan dalam perjanjian itu (lihat perenggan 25).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3491–3494.

Cases referred to

Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd [1989] 3 MLJ 216, HC (refd)

Appeal from: Suit No 22–165 of 2007-III (High Court, Kuching)

Yong Sie Mee (Loke, King, Goh & Partners) for the appellant.
Mekanda Singh Sandhu (Satinder Singh Sandhu with him) (Sandhu & Co) for the respondent.

Mohamad Ariff JCA (delivering judgment of the court):

[1] This appeal concerned a claim by the respondent, Alpharich Sdn Bhd ('Alpharich'), as plaintiff in the High Court under a building contract for payment under an interim certificate and for additional works. The appellant/defendant, Juara Serata Sdn Bhd ('Juara'), counterclaimed for

damages for defective workmanship and for making good the construction defects, and liquidated and ascertained damages for delay in the completion of the project. The High Court allowed Alpharich's claim on the interim payment with interest thereon, but dismissed the claim for damages for additional works. Juara's counterclaim was dismissed on all counts.

[2] We dismissed the appeal with costs by a unanimous decision. In our view, the High Court had properly appreciated the evidence and came to the correct findings on the facts and the law. The case was decided by the High Court mainly on issues of construction of the relevant clauses in the building contract, which we will elaborate below.

[3] Essentially, this was a case where the court was of the view that it would be incorrect to rewrite the bargain between the parties. They were held to their bargain as expressed in the building contract. In brief, the dispute between the parties concerned the effect on the validity of an interim certificate, the role of the architect as certifier and contract administrator, and contractual mechanism to resolve the dispute touching on the validity of the interim certificate and/or any set-off for defective works and repairs, that can be claimed by the employer against the contractor to challenge the amount certified by the architect in the interim certificate for payment.

[4] On the facts of this case, the architect was appointed by Alpharich.

[5] The building contract in question was an agreement dated 28 March 2005 between Juara and Alpharich by which Juara appointed Alpharich as the sole and exclusive contractor to construct and complete building works described as '*Pusat Latihan Khidmat Negara, Kem Unity*' in Serian, Sarawak. Juara was identified in this agreement as 'the Employer' and Alpharich as 'the Contractor'. The agreement acknowledged that Juara had been appointed to complete the works, ie '*Pusat Latihan Khidmat Negara, Kem Unity*' by the Ministry of Defence Malaysia which was the 'Client'. On the facts, therefore, Juara had effectively sub-contracted the works to Alpharich. In its relationship with the Ministry of Defence, Juara was appointed as the operator of the camp for the '*Program Latihan Khidmat Negara*' ('PLKN'). The '*Surat Setujuterima Sewaan Kem*' (on pp 419–422 of the appeal record, Vol 5) showed the returns to be received by Alpharich for this arrangement, and we quote:

> Berdasarkan kadar sewaan ... jumlah sewaan bagi tahun ialah RM5,543,487.00 dan bagi empat (4) tahun ialah RM22,173,948.00.

[6] On the other hand, and under the sub-contract arrangement with Alpharich, Juara as employer was to pay Alpharich the consideration sum of

RM4,950,000 'upon certification by the Client that the Works have been duly completed' (cl 2 of the agreement).

[7] Alpharich agreed to carry out the works in conformity with the drawing plans and the schedule of compliance (which were annexed to the agreement), and to complete the works on or before 31 May 2005. Alpharich was in effect a turnkey contractor for Juara. It was common ground that the works were not completed on the agreed completion date, but were certified as completed on 8 July 2005.

[8] The letter from the architect, Chai Long Sen (PW2), and the accompanying detailed valuation of work done that amounted to a certificate of practical completion, can be seen on pp 404–406 of the appeal record, Vol 1.

[9] On the evidence, Juara had also unconditionally accepted the handing over of the completed works, and had operated the site for the PLKN.

[10] There was a site inspection conducted by the architect on 16 January 2006 in the presence of Juara and Alpharich representatives to determine the status of the building works, and a site valuation report produced. See pp 443–446, appeal record, Vol 1. The works were confirmed as 100% completed, but a 'Building Defect List' was prepared as well, which included 'sagging roof', 'roof leakage', 'sagging ceiling', 'apron crack' and 'ponding at toilet and bathroom areas', with a notation: 'Detail Investigation is required at all *Blok Kediaman Pelatih* to determine the soundness of Roof Structure for occupancy'. The architect then issued the interim payment certificate, ie Interim Payment Certificate No 1 on 21 November 2006 for the sum of RM1,202,500. The sum of RM1,202,500 was arrived at on the basis of work done as at 21 November 2006 on the agreed contract sum of RM4,950,000 less previous payments made to Alpharich (RM3,500,000) and less retention sum of 5% (RM247,500).

[11] In his testimony, the architect (PW2) said that he was sufficiently apprised of the work done and had sufficient information on which to issue the interim payment certificate.

[12] This interim certificate was issued under cl 8 of the agreement, in particular cl 8.1:

> 8.1 Within Seven (7) days of receiving the Statement of Work Done, the Architect/Consultant shall issue an interim certificate (hereinafter referred to as 'the Interim Certificate') to the Employer (with a copy to the Contractor) stating the amounts to which the Contractor is, in the Architect/Consultant's opinion, entitled in respect of each of the amounts stated in the Statement of Works done.

[13] Clauses 8.2 and 8.3 provided for the retention by the employer of the 5%, and cl 8.4, the payment of interest at 1% per month calculated on a day to day basis from the due date (date of receipt of the interim certificate) until payment.

[14] On the facts, it was evident that the interim certificate was issued after the expiry of the defects liability period that had ended ten months earlier.

[15] Juara did not make a reference to the architect to dispute the sum, and further, did not initiate steps to refer the dispute to arbitration.

[16] It is common ground that no final certificate was issued by the architect. Juara did not pay the certified amount under the interim certificate, arguing that Alpharich had not constructed the camp in accordance with the schedule of compliance, failed to comply with the drawing specifications, failed to provide septic tanks, failed to complete the project on time, and had failed to remedy defective works. Juara argued it had no choice except to accept the handover since it had to satisfy its commitment to the Ministry of Defence to take in the national service candidates, although it had to scale down the number of intake. Juara argued it had to spend RM1,338,459.44 for remedial works, and thus counterclaimed for the same. As for the interim certificate, Juara maintained that it was fatally flawed and invalid since it was issued without complying with the requirements of cl 8 that required a statement of works done to be first sent to the architect.

[17] Juara also attacked the issue of the interim certificate as tainted by mala fides on the part of the architect who had failed to act professionally and impartially. It argued that the architect had acted to serve merely the interests of Alpharich.

[18] The High Court allowed Alpharich's claim on the interim certificate but not its claim for additional works. The High Court also dismissed Juara's counterclaim. The learned judge came to his findings and decisions based on the contractual provisions, more exactly cll 7, 8, 16 and 17.

[19] The learned judge was swayed by the reference made to the architect by Alpharich under cl 16, and the failure by Juara to resort to the mechanism provided under cl 17 in the event of a dispute on the certification, namely to refer the dispute to arbitration. To appreciate the train of analysis of the High Court, we reproduce below the relevant parts of His Lordship's judgment:

> Chai Long Sen (PW2) testified that at all material times he was a practising Architect in Jurubina Unireka and was appointed by the Plaintiff under Clause

22.4. The salient features of PW2's role under the Agreement are set out in the following clauses:

Clause 6 — The issuance of a certificate of non-completion upon which the defendant can claim from the plaintiff the sum of RM450.00 per day as liquidated and ascertained damages for the period during which the works stated remain incomplete.

Clause 7 — Issuing the Certificate of Practical Completion whereby the works shall be deemed to be completed on the date named in the certificate.

Clause 8 — To issue Interim Certificate to the defendant stating the amount to which the plaintiff is entitled for works done; and Clause 16 — The same is reproduced for the sake of completeness and clarity:

SETTLEMENT OF DISPUTE

16.1 In the event of any dispute or difference arising between the Employer and the Contractor, either during the progress or after the completion of the works, or after the determination of the Contractor's engagement or breach of this Agreement or the repudiation or abandonment of this Agreement by either party as to:

16.1.1 the withholding of any certificate, decision or instruction to which the Contractor may claim to be entitled to; or

16.1.2 the withholding of any payment to which the Contractor may claim to be entitled to under this Agreement; or

16.1.3 any other matter arising under or, out of, or in connection with this Agreement or the Works;

Then such dispute or difference shall be referred to the Architect/Consultant for a decision.

[20] As earlier indicated, Alpharich made a reference under cl 16.1. The architect wrote to both parties on 16 October 2006 and 14 December 2006 stating the following respectively:

With reference to our Certificate of Practical Completion, the scope of works as indicated in the drawings has been practically completed for all purposes of the Contract.

Our decision under Clause 16.2 of the Contract is that Alpharich is entitled to payment by the Employer of the sum of RM1,202,500.00 under Payment Certificate No. 1.

[21] The learned judge noted that Juara did not show that it was dissatisfied with the two decisions he made since it did not refer the matter to arbitration under cl 17, which read:

17.1 In the event:

17.1.1 the Architect/Consultant shall fail to give his decision;

17.1.2 either party is dissatisfied with any decision of the Architect/Consultant given pursuant to Clause 16.2 (such dissatisfaction shall be deemed a dispute), then the Employer or the Contractor may within a further seven (7) days after the expiration of the said 14 days after receiving the Architect/Consultant's decision, whichever is earlier give notice to the other party of its intention to refer the dispute or difference to arbitration ('Notice of Arbitration') for decision by a sole arbitrator.

[22] The most important part of the High Court judgment read:

Held to the Agreement, the various excuses for non-payment of the amount certified by PW2 as set out in the pleaded defence are non-starters by virtue of Clause 16.2 because none was referred to PW2 under Clause 16 nor was the decision of PW2 in respect of his Certificate for Payment ...

[23] In short, the High Court was unwilling to 'audit the bargain' of the parties. The various reasons for non-payment of the interim certificate amount were described as 'non-starters' because of the failure by Juara to adhere to the contractual mechanism for dispute resolution. This emphasis on clear contractual requirements also led to the other decisions of the learned judge to dismiss the Alpharich's claim for additional works (relying on cl 4.6) and Juara's counterclaim for damages and LAD (relying on cll 7.2 and 6). Referring to cl 4.6, Alpharich's claim for additional works failed because it could not show that the variations were agreed in writing. Juara's claim for amounts expended by Juara to third parties to remedy defective works failed because it could not show any written instructions from it to Alpharich to make good the defects under cl 7.2. As regards the LAD claim, the High Court relied on the proviso to cl 6 that required the architect to first issue a certificate of non-completion, reading:

PROVIDED ALWAYS that the Employer shall not be entitled to claim any loss or damage under this Clause unless and until the Architect/Consultant shall have issued to the Employer a certificate in writing stating that in the Architect/Consultant's opinion the Works (or the relevant part thereof) ought reasonably to have been completed by the Completion Date or within any extended period or periods (as the case may be).

[24] We considered appellant counsel's detailed submissions on the law and the less than satisfactory testimony of PW2, particularly in relation to the non-compliance of cl 8 and the need to establish that a statement of works done had been forwarded to the architect by Alpharich before he issued the Interim Certificate No 1. The answers given by PW2 were found to be non-committal or evasive, but the fact remained the agreement itself did not contain a definition of 'Statement of Work Done', and there was no dispute that the architect conducted a site inspection and evaluation before he issued the interim certificate. The architect's delay in issuing the interim certificate until

after the expiry of the defects liability period was also odd. We had no issue on the law on the duties and responsibilities of an architect/consultant as certifier and the circumstances when an interim certificate can be challenged for invalidity. The persuasive authority in the Singapore High Court decision in *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 3 MLJ 216, cited by counsel, which lay down the law that an interim certificate issued without fulfilling stated pre-requirements would be invalid, however, was not, to our mind, of immediate relevance in view of the larger issue which became the foundation of the High Court decision, namely Juara had to be held bound by the terms of the agreement and it had failed to adhere to the dispute resolution mechanism agreed by the parties.

[25] In our view, and after carefully considering appellant counsel's oral and written submissions and the submissions by respondent's counsel, we found that the High Court had not plainly erred in law, or on the facts, to warrant appellate intervention. Having concluded thus, we were not departing from the established law on the status and validity of interim certificates, and the functions and responsibilities of the architect/consultant as certifier. The challenges to the validity of the interim certificate and the exercise of the responsibilities and duties of the architect should however have been properly brought before an arbitral tribunal as stated in the agreement. On the general law, suffice for us to quote from Sundra Rajoo, Harbans Singh, *Construction Law in Malaysia* [2012], which contains a concise and clear exposition of the law:

> An Interim Certificate ... represents essentially an approximate value of the work done at the time of its issue and may be adjusted in subsequent certificates for matters such as errors, overvaluation, etc.; the final date for doing so being generally the date of issue of the Final Certificate (see *Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council & Anor* [1986] 33 BLR 39; see also *Fairclough Building Ltd v Rhuddlan Borough Council* [1985] 30 BLR 26 and *Asiapools (M) Sdn Bhd v UM Construction Sdn Bhd* [2010] 3 MLJ 7 ...
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> The validity of a certificate may, however, be compromised if it can be successfully challenged on grounds such as the existence of errors on its face, fundamental inaccuracies in content and computation, it not being in correct form, it not being issued in the authorised manner or by the authorised person, it not being given in time, where the Certifier acts ultra vires, where there is improper pressure or influence on the Certifier, where there is fraud or collusion between the Certifier and the relevant party to the contract, etc ... (at p 389 of the text).

[26] Thus, for the reasons elaborated above and the failure by Juara to resort to the agreed dispute resolution mechanism, the appeal was dismissed with costs of RM10,000 to the respondent.

[27] We further ordered the deposit to be paid to the respondent to account of costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor